

**Sia Kim Yoke v Public Prosecutor
and another appeal**

HIGH COURT (MELAKA) — CRIMINAL APPEAL NOS 41–13 OF 1997
AND 41–16 OF 1997

SURIYADI J

29 OCTOBER 1997

Criminal Procedure — Appeal — Right of appeal — Plea of autrefois convict failed — Whether appeal could be filed — Whether plea of autrefois convict falls within the perimeters of substantive law — Whether order meted by magistrate in rejecting plea of autrefois convict came within ambit of s 307(i) of the Criminal Procedure Code — Criminal Procedure Code (FMS Cap 6) s 307(i) — Federal Constitution art 7(2)

Criminal Procedure — Judgment — Grounds of judgment — Plea of autrefois convict failed — Whether magistrate is required to supply grounds of judgment — Whether plea of autrefois convict substantive or procedural in nature

Two criminal appeals were dealt with simultaneously as they involved the same points of law and the same solicitor. The solicitor had submitted before the magistrate the issue of autrefois convict vide two separate notices of motion, praying that the accused persons should not be made to suffer charges based on facts which they had already been convicted of. The objections failed and the matters were postponed, giving counsel time to file the respective appeals pursuant to those orders. However, both magistrates were unwilling to supply the grounds of decision. The magistrates took the stance that as the matters in question were procedural in nature, it did not necessitate them preparing the grounds of decision. They had also insisted that the hearing would not be stayed, despite the fact that the notice of appeal had been filed pursuant to this matter. This matter subsequently came to the attention of the High Court. It had to decide on three main issues, namely: (i) whether an appeal could be filed against the notice of motion; (ii) whether a magistrate is required to supply the grounds of judgment; and (iii) at what stage must the doctrine of autrefois convict be brought to the attention of the magistrate.

Held, ordering the magistrate to prepare the grounds of decisions and directing that the trial be halted pending the outcome of the appeal:

- (1) Section 323 of the Criminal Procedure Code (FMS Cap 6) ('the CPC') gives a High Court judge wide powers to examine the records for purposes of satisfying himself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and thereafter substitute it with any order if necessary. It was therefore legally correct for the High Court to enquire into this matter as it has the powers of revision to do so (see pp 662I and 663C–D).

- A (2) The plea of *autrefois convict* falls within the perimeters of substantive law, particularly the relevant law that creates, defines and regulates the rights of parties. The substantive legal right of the accused is fortified by the fact that it is clearly statutory based and is further enshrined in art 7(2) of the Federal Constitution.
- B The accused's prayer was not that part of the law that prescribes methods or procedures of enforcing a person's rights, but the very unbounded right which is appealable (see pp 665H-I and 666B-D).
- C (3) The order meted by the learned magistrate pursuant to the notice of motion certainly came within the ambit of s 307(i) of the CPC. The order pronounced certainly was not a judgment derived from a completed trial but pursuant to a summary proceeding which came via a motion. It affected the rights and person of the accused, with that order being enforceable and final in that he was now prevented from pleading that bar, or of adducing any evidence to prove his previous conviction based on the same facts (see p 668B-C).
- D (4) Since the issue at hand was not procedural but substantive in nature and hence appealable, the magistrate statutorily could not be excused from preparing the grounds of decision. Section 307(3) of the CPC requires the magistrate to prepare the mandatory grounds of decision (see p 668D-F).
- E (5) The plea of *autrefois convict* ought to be ventilated at the earliest of stages. This is because s 303(2) of the CPC gives preferential treatment to the plea of *autrefois acquit* or *autrefois convict* in that these pleas shall be tried and disposed of before the trial proper or before other issues require to be resolved (see pp 663F and 668G).
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[Bahasa Malaysia summary]

- G Dua rayuan jenayah diuruskan sekaligus kerana mereka melibatkan hujah undang-undang dan peguamcara yang sama. Peguamcara telah menghujahkan di hadapan majistret atas isu *autrefois convict* melalui dua notis usul yang berasingan, dengan memohon bahawa tertuduh tidak harus dipaksa menanggung pertuduhan berdasarkan fakta yang mana mereka telah pun disabit. Bantahan-bantahan gagal dan perkara-perkara ditangguh, memberikan peguam masa untuk memfailkan rayuan masing-masing menurut perintah itu. Namun demikian, kedua-dua majistret enggan membekalkan alasan penghakiman. Majistret-majistret berpandangan bahawa oleh kerana hal berkenaan adalah bersifat prosedur, ia tidak menghendaki mereka menyediakan alasan penghakiman. Mereka juga telah menegaskan bahawa pembicaraan tidak akan digantung, meskipun notis rayuan telah difailkan menurut perkara ini. Hal ini kemudiannya telah menarik perhatian Mahkamah Tinggi. Ia hendaklah memutuskan tiga isu utama, iaitu: (i) sama ada suatu rayuan boleh difailkan terhadap notis usul; (ii) sama ada seseorang majistret dikehendaki membekalkan alasan penghakiman; dan (iii) di peringkat manakah doktrin *autrefois convict* mestilah dibawa kepada perhatian majistret.
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Diputuskan, memerintah majistret menyediakan alasan penghakiman dan mengarahkan bahawa perbicaraan diberhentikan sementara menunggu keputusan rayuan:

- (1) Seksyen 323 Kanun Acara Jenayah (NMB Bab 6) ('KAJ') memberikan seorang hakim Mahkamah Tinggi kuasa yang luas untuk memeriksa rekod untuk tujuan memuaskan diri mengenai kebetulan, kesahihan atau kewajaran mana-mana keputusan, hukuman atau perintah yang direkodkan atau diluluskan, dan selepas itu menggantinya dengan apa-apa perintah jika perlu. Dengan itu adalah betul dari segi undang-undang untuk Mahkamah Tinggi menyasal hal ini kerana ia mempunyai kuasa penyemakan untuk berbuat demikian (lihat ms 662I dan 663C-D).
- (2) Hujah autrefois convict terangkum dalam sempadan undang-undang substantif, khususnya undang-undang relevan yang mewujudkan, mentafsir dan mengawal hak pihak-pihak. Hak sah tertuduh yang substantif diperteguhkan oleh fakta bahawa ia dengan jelasnya berdasarkan statut dan selanjutnya disemadikan dalam perkara 7(2) Perlembagaan Persekutuan. Permohonan tertuduh bukan sebahagian undang-undang yang menetapkan cara atau prosedur menguatkuasa hak seseorang, tetapi hak yang tidak terikat yang boleh dirayu (lihat ms 665H-I dan 666B-D).
- (3) Perintah yang dibuat oleh majistret yang arif menurut notis usul memang dirangkumi oleh s 307(i) KAJ. Perintah yang diumumkan sudah tentu bukanlah suatu penghakiman yang diperolehi daripada perbicaraan yang sempurna tetapi menurut prosiding terus yang muncul menerusi suatu usul. Ia menjejaskan hak dan orang tertuduh, kerana perintah itu boleh dikuatkuasa dan muktamad dalam ertikata dia kini terhalang daripada menghujahkan halangan itu, atau mengemukakan sebarang keterangan untuk membuktikan sabitan dahulu berdasarkan fakta yang sama (lihat ms 668B-C).
- (4) Oleh kerana isu ini bukanlah berkenaan prosedur tetapi bersifat substantif dan justeru itu boleh dirayu, mengikut undang-undang majistret tidak boleh dikecualikan daripada menyediakan alasan penghakiman. Seksyen 307(3) KAJ menghendaki majistret menyediakan alasan penghakiman yang berupa mandatori (lihat ms 668D-F).
- (5) Hujah autrefois convict patut diutarakan pada peringkat yang paling awal. Ini adalah kerana s 303(2) KAJ memberikan layanan keutamaan kepada hujah autrefois acquit atau autrefois convict dalam ertikata bahawa hujah-hujah ini hendaklah dibicarakan dan diselesaikan sebelum perbicaraan sebenar atau sebelum isu lain yang perlu diselesaikan (lihat ms 663F dan 668G).]

Notes

For cases on right of appeal, see 5 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 375-432.

- A For a case on grounds of judgment, see 5 *Mallal's Digest* (4th Ed, 1994 Reissue) para 1459.

Cases referred to

- Chinery, Ex parte* (1884) 12 QBD 342 (refd)
- B *Gng Eng Hwoo v R* [1954] MLJ 256 (refd)
- Hari Ram Seghal v PP* [1981] 1MLJ 165 (refd)
- Indran & Anor v PP* [1985] 1 MLJ 326 (refd)
- Jaafar bin Abu & Anor v PP* [1988] 2 MLJ 363 (refd)
- Jamali bin Adnan v PP* [1986] 1 MLJ 162 (refd)
- Lee Lee Cheng (f) v Seow Peng Kwang* [1960] MLJ 1 (refd)
- C *M Raman v Ayavoo* [1957] MLJ 14 (refd)
- Maleb bin Su v PP & Cheak Yoke Thong v PP* [1984] 1 MLJ 311 (refd)
- Marzuki bin Mokhtar v PP* [1981] 2 MLJ 155 (refd)
- Mohamed Salleh v PP* [1969] 1 MLJ 104 (refd)
- D *Mohamed Yusoff bin Samadi v A-G* [1975] 1 MLJ 1 (refd)
- Onslow v Commissioners of Inland Revenue* (1890) 25 QBD 465 (refd)
- Pendakwa Raya lwn Chua Chor Kian* Mahkamah Tinggi Melaka
Penyemakan Jenayah No 43-1-97 (refd)
- PP v Hoo Chang Chwen* [1962] MLJ 284 (refd)
- PP v RK Menon & Anor* [1978] 2 MLJ 152 (refd)
- E *PP v Teh Cheng Poh* [1978] 1 MLJ 68 (refd)
- Tennakoon D Harold v PP* [1997] 4 MLJ 497 (refd)

Legislation referred to

- Criminal Procedure Code (FMS Cap 6) ss 302, 303, 307(1), (3),
(6), 323
- F Federal Constitution art 7(2)

Shaari Nor (Shaari Nor & Co) for the accused.

Anselm Charles Fernandis (State Legal Adviser's Chambers) for the prosecution.

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- Suriyadi J:** Two cases, namely Rayuan Jenayah 41-13-1997 and 41-16-1997 were dealt with simultaneously as they suffered the same problems, involving not only the same points of law, but also the same solicitor who represented the accused persons. In a gist, Shaari Nor of Messrs Shaari Nor & Co, before the respective learned magistrates, had submitted the issue of autrefois convict vide two separate 'notis usul' (notices of motion) praying therefrom that the accused persons should not be made to suffer charges based on facts on which they already had been convicted of. Unfortunately, the objections failed. For some rhyme or reason the matters were postponed, giving ample time for counsel to file the respective appeals pursuant to those orders.
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He filed the notices of appeal for both cases within time and thereafter waited for the written judgments of the magistrates to enable him to prepare the petitions of appeal. He was startled when both magistrates in

the same tone, and with the same messages, took the stance that they were unwilling to supply the grounds as the matters in question were procedural in nature, which did not necessitate them to prepare the grounds. For easy reference, suffice that I merely reproduce only one letter in extenso, as both of them contained similar messages (I shall also deal with one case with the other subject to the outcome of this selected case). This selected letter reads:

Ruj Kami: MM 83-194-94
Tarikh: 12 September 1997

Timbalan Pendaftar
Mahkamah Tinggi
Melaka

Puan,

Mahkamah Majistret Kes Tangkap No 83-194/94
Sia Kim Yoke dan satu lagi v PR

Merujuk kepada perkara di atas, adalah dimaklumkan kepada pihak puan bahawa saya tidak akan menyediakan alasan bertulis kepada keputusan saya yang dibuat pada 16 Mei 1997.

Ini kerana keputusan tersebut bukanlah satu keputusan akhir yang dibuat selepas perbicaraan penuh. Ianya semata-mata satu keputusan terhadap isu undang-undang yang dibangkitkan di peringkat awal melalui notis usul. Oleh yang demikian, saya dengan rendah diri percaya bahawa rayuan akan dikendalikan secara re-hearing.

Walau bagaimanapun, jika pendapat saya adalah salah dan pihak puan masih memerlukan alasan tersebut — saya bersedia untuk menyediakannya dengan satu notis yang munasabah.

Sekian. Terima kasih.

‘Berkhidmat untuk negara’

Saya yang menurut perintah,

tt
Majistret
Mahkamah Majistret II
Melaka

Pursuant to this letter — which by some peculiar reasoning was sent to the senior assistant registrar and not the accused’s counsel — not only did the magistrate adamantly refuse to write the grounds, but had insisted that despite that notice of appeal having been filed, the hearing would still not be stayed. The matter eventually came to my attention, and having heard the consternation voiced out by counsel, it thus became incumbent upon me to call up the file and if need be, to unravel and resolve the problem.

Under s 323 of the Criminal Procedure Code (FMS Cap 6) (‘the CPC’), a High Court judge is given wide powers to examine the records for purposes of satisfying himself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and thereafter substitute it with any order if necessary. Wan Yahya J (as he then was) in

- A *Hari Ram Seghal v PP* [1981] 1MLJ 165 at p 166, when discussing s 323 of the CPC, had occasion to say:

The object of these provisions is to correct any miscarriage of justice arising not only from error in judgment and procedure but from neglect or indolence on the part of those in authority and resulting in undeserved hardship on any individual affected by such judgment, neglect or indolence.

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Further at p 168, his Lordship said:

The persons appearing in our courts have the right to expect the best quality of justice and nothing less. Any mistake or flaw in that machinery, which may have the possibility of injustice, must be resolved, in their favour.

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(See also the unreported case of *Pendakwa Raya lwn Chua Chor Kian Mahkamah Tinggi Melaka Penyemakan Jenayah No 43-1-97.*) It is therefore legally correct for me to enquire into the matter at hand, as the powers of revision are given to the High Court, particularly where the record has been called for by itself or which has been reported for orders or that which comes to its knowledge (see *Jaafar bin Abu & Anor v PP* [1988] 2 MLJ 363).

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For purposes of the matter at hand, three main issues were canvassed, namely:

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- (1) whether an appeal could be filed as against the 'notis usul';
- (2) whether a magistrate is required to supply the grounds of judgment; and
- (3) at what stage must the doctrine of *autrefois* convict be brought to the attention of the magistrate?

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Under s 303 of the CPC, a plea of a previous acquittal or conviction may be pleaded orally or in writing, by merely stating that he is not liable to be tried again by virtue of the latter doctrines. It is statutorily provided that a preferential treatment is given to the plea of *autrefois* convict or *autrefois* acquit in that these doctrines shall be tried and disposed of before the trial proper or other issues do get underway or are required to be resolved.

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Seah SCJ in *Jamali bin Adnan v PP* [1986] 1 MLJ 162 at p 164 clearly said:

As a matter of procedure, the plea of *autrefois* convict ought to be raised and determined before the commencement of the trial ... [See s 303(2) of the CPC. See also 5 *Mallal's Digest* (4th Ed) para 514.]

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But what is a plea of *autrefois* convict or *autrefois* acquit? In answer to this legal poser, it is difficult to improve on what was printed at p 146 para 241 of 2 *Halsbury's Laws of England* (4th Ed) which reads:

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The pleas of *autrefois* convict or of *autrefois* acquit aver respectively that the defendant has been previously convicted or acquitted on a charge for the same offence as that in respect of which he is arraigned. If shown to be well-founded, such a plea operates as a bar to the indictment, since a person cannot be tried for an offence of which he has been previously convicted or acquitted, or for an offence of which he could have been convicted on some previous indictment. The pleas of *autrefois* convict and *autrefois* acquit may be pleaded orally, but must afterwards be reduced to writing.

Rigby J in *M Raman v Ayavoo* [1957] MLJ 14 also had occasion to say (at p 15):

The plea of autrefois convict is really a plea in bar to trial and should be raised before pleading to the charge. ... It is quite clear that, to enable an accused person to rely on that plea, the offence with which he is charged on the second occasion must be the same offence, or practically the same offence, as that with which he was charged on the first occasion. [See also PG Osborn, *A Concise Law Dictionary* (5th Ed) at p 39; *PP v Teh Cheng Poh* [1978] 1 MLJ 68.]

Scrutinizing the mode that was employed by the learned counsel in bringing the matter before the learned magistrate, it is a fact that the conduit was a 'notis usul', a mode that is not objectionable. I found good authority in the form of the write-up in 2 *Halsbury's Laws of England* (4th Ed) at p 145 para 239 which reads:

It is more usual for the defendant to raise the question of want of jurisdiction under a motion to quash the indictment or on a plea to the general issue.

A perusal of s 303 of the CPC will show that this provision is silent as to the format required to be employed to convey this doctrine/right to the attention of the magistrate. There must be some infinite wisdom behind the liberality of the provision when Parliament passed this law. It is not the court's business to defeat that approach by eroding away that liberality in the form of more stringent rules. So long as no substantial injustice occurs, the format becomes secondary. In the case of *Mohamed Yusoff bin Samadi v A-G* [1975] 1 MLJ 1, an originating summons was instead used to highlight the legal consternation.

It must be emphasized at the outset that all parties concerned had been forewarned, whereupon a hearing date was fixed, with some decision expected of the relevant magistrate. Even though I was not impressed with the manner and language of the 'notis usul', I could not deny the fact that no one was misled by the contents and prayer. The accused, in brief, was applying to the court to have the charge dismissed, even before the trial began on the basis of that special plea in bar to criminal prosecutions, a right promulgated under s 302 of the CPC. At the opening stage, I detected some resistance on the part of the learned deputy public prosecutor when he ventilated that the issue at hand was a procedural matter and therefore, did not come within the purview of s 307 of the CPC. But this resistance was temporary, much to his credit and integrity. On the issue of 'procedural matter', the case of *PP v RK Menon & Anor* [1978] 2 MLJ 152 was brought to my attention, particularly these views (at p 152):

There is no right of appeal against a procedural ruling made by a subordinate court in the course of and during the hearing of a criminal trial. ... But a procedural ruling is not a judgment, sentence or order within the meaning of s 307(i) of the CPC.

Similarly, Abdul Malik Ishak J in *Tennakoon D Harold v PP* [1997] 4 MLJ 497 had occasion to reiterate the above trite law. I have no quarrel with the views of those cases as regard procedural matters, on the simple

A legal logic that a procedural ruling is not a judgment, sentence or order within the meaning of s 307(i) of the CPC. No lengthy discussion is necessary to substantiate this remark.

In the final analysis, my eventual decision after due deliberation was that the matter at hand was a matter of substantive law and not a procedural question that warranted a procedural ruling from a subordinate court in the course of a criminal trial. Distinguishing factors were conspicuous and numerous. The first difference was that the objection to the whole criminal proceeding began with the hearing of a 'notis usul' which required an order. It was not a mere procedural ruling that was being sought for. That order that was pronounced was not a ruling that emanated in the midst of an ongoing trial but delivered even before the hearing began.

The second distinguishing factor is that a proven plea of autrefois convict is a complete bar to any repeated indictment, with the onus of proof lying with the accused. Section 302 of the CPC in no uncertain term provides:

(i) A person who has been tried by a court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence nor on the same facts for any other offence for which a different charge from the one made against him might have been made under s 166 or for which he might have been convicted under s 167.

As said above, at para 241 of 2 *Halsbury's Laws of England* (4th Ed), that 'if shown to be well founded, such a plea operates as a bar to the indictment'. It will be an act of unqualified unfairness if the respondent were required to endure the unnecessary and excruciating hearing, only to be acquitted at the end of the day by virtue of the strength of that plea. It is made even more unforgiveable when that predicament is occasioned by a ruling that that plea may only be allowed to be aired or considered at the tail end of the trial. To pursue that course of action surely is a travesty of justice when the very purpose of that doctrine is to ensure that the accused does not have to suffer that humiliating indignity, apart from saving him from being convicted of the same offence. The issue here is a far cry to the run of the mill procedural questions that magistrates invariably have to put up with, eg having to decide whether a piece of evidence is admissible, whether if admissible is relevant, whether a particular question answer is hearsay based and the like that will invite some ruling.

Even at this early stage, I have no hesitation in concluding that this plea of autrefois convict, certainly falls smack within the perimeters of substantive law, particularly the relevant law that creates, defines and regulates the rights of parties (John Burke, *Jowitt's Dictionary of English Law* (2nd Ed) Vol 1 p 48; *PP v Hoo Chang Chwen* [1962] MLJ 284). In *Black's Law Dictionary* (6th Ed) p 1429, 'substantive law' is defined as:

That part of law which creates, defines, and regulates rights and duties of parties, as opposed to 'adjective, procedural, or remedial law,' which prescribes method of enforcing the rights or obtaining redress for their

invasion: *Allen v Fisher* 574 P 2d 1314, 1315. The basic law of rights and duties (contract law, criminal law, tort law, law of wills, etc) as opposed to procedural law (law of pleading, law of evidence, law of jurisdiction, etc).

In *Mohamed Salleh v PP* [1969] 1 MLJ 104, when discussing the right of an accused person to make an unsworn statement from the dock, Wee Chong Jin CJ opined at p 105 para D left, inter alia, that ... 'a substantive right of an accused person ... does not depend on whether or not there is a specific provision for it in the CPC'. In our case, that substantive legal right of the accused is indeed fortified by the fact that it is clearly statutory based (s 302 of the CPC). In fact, to go one step further, this right is enshrined in art 7(2) of the Federal Constitution which reads:

A person who has been acquitted or convicted of an offence shall not be tried again for the same offence except where the conviction or acquittal has been quashed and a retrial ordered by a court superior to that by which he was acquitted or convicted.

Supported by all these authorities, how could I not be convinced that the accused's prayer was certainly not that part of the law that prescribes methods or procedures of enforcing a person's rights but the very unbounden right which is appealable.

Under Pt VII of the CPC is found s 307(i) which reads:

Except in any case to which s 304 applies and subject to the provisions of ss 305 and 306, any person who is dissatisfied with any judgment, sentence or order pronounced by any magistrate's court in a criminal case or matter to which he is a party may prefer an appeal to the High Court against such judgment, sentence or order in respect of any error in law or in fact or on the ground of the alleged excessive severity or of the alleged inadequacy of any sentence by lodging, within 10 days from the time of such judgment, sentence or order being passed or made, with the clerk of such magistrate's court a notice of appeal in triplicate addressed to the High Court and by paying at the same time the prescribed appeal fee.

The relevant appeal provision speaks of judgment, sentence and order. It is without doubt that the decision of the learned magistrate was not a judgment. For completeness, it will suffice for me to merely refer to the case of *Marzuki bin Mokhtar v PP* [1981] 2 MLJ 155 where the judge there opined that 'judgment' indicated a final order in a trial concluding in the conviction or acquittal of the accused. This eliminates that factor with regard to the current case. Certainly the issue of sentence does not arise. The only other ground available for appeal is under the heading of 'order' as pronounced by the learned magistrate. The issue at hand not only was from a criminal case, but at the very least related to a criminal matter.

In *Jowitt's Dictionary of English Law*, Earl Jowitt at p 1273 explained 'order' thus:

As a general rule, 'order' is opposed to 'judgment,' and therefore denotes orders made in summary proceedings on petition or summons ... [see also *Jowitt's Dictionary of English Law* (2nd Ed) at p 1290 and *Stroud's Judicial Dictionary* (4th Ed) at p 1866].

- A In *Ex parte Chinery* (1884) 12 QBD 342, Cotton LJ at p 345 said:
- Now, in legal language, and in Acts of Parliament, as well as with regard to the rights of the parties, there is a well-known distinction between a 'judgment' and an 'order'. No doubt the orders under the Judicature Act provide that every order may be enforced in the same manner as a judgment, but still judgments and orders are kept entirely distinct. [Bowen LJ endorsed this view.]
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The above views of their Lordships were endorsed by the Court of Appeal in *Onslow v Commissioners of Inland Revenue* (1890) 25 QBD 465 at p 466, where Lord Esher MR said:

- C A 'judgment', therefore, is a decision obtained in an action, and every other decision is an order.

- D Nearer home we have the case of *Gng Eng Hwoo v R* [1954] MLJ 256 where Whitton J discussed this issue. In this case, the proceedings started with the prosecution of a person for alleged unlawful possession of raw opium in contravention of the Dangerous Drug Ordinance. He was acquitted but the owner of the vessel in which the drugs were found was required to show cause as to why that vessel ought not to be forfeited. In the middle of the proceeding, without waiting for the hearing to be terminated, the presiding magistrate made a finding of fact. At that point, counsel for the appellant gave notice that he wanted to file a notice of appeal based on that premature finding, and the proceedings were adjourned. Whitton J, with regard to the issue of 'order' at p 257, had this to say:
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- F ... but my research into the matter has led me to the conclusion that in connection with a criminal cause or matter the word is confined, broadly speaking, to those final decisions of a court which affect parties to the proceedings in respect of their person or property. [His Lordship later dismissed the appeal on the basis that it was still premature.]

Hashim Yeop A Sani FJ in *Maleb bin Su v PP & Cheak Yoke Thong v PP* [1984] 1 MLJ 311 at p 312C-D left had this to say:

- G There is no argument, in my opinion, that the ejusdem generis rule applies to the word 'order' which is preceded by the words 'judgment' and 'sentence'. The order must therefore be a final order in the sense that it is final in effect as in the case of a judgment or a sentence. The test for determining the finality of an order is to see whether the judgment or order finally disposes of the rights of the parties. [This case was referred and followed by Peh Swee Chin J (as he then was) in *Indran & Anor v PP* [1985] 1 MLJ 326.]
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To reiterate, an 'order' under s 307 of the CPC generally:

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- (1) is opposed to judgment (in the case of *Lee Lee Cheng (f) v Seow Peng Kwang* [1960] MLJ 1 at p 3, in no uncertain terms the court said 'It is axiomatic that when different words are used in a statute they refer to different things ...');
 - (2) is normally made in summary proceedings on petition or summons;
 - (3) may be enforced in the same manner as a judgment;

- (4) affects parties to the proceeding in respect of their person or property; and A
(5) is final in that it finally disposes of the rights of the parties.

Based on the facts adduced before me, I found no difficulty in deciding that the order meted by the learned magistrate pursuant to the 'notis usul' certainly came within the ambit of the above five factors. To relate to them, the order pronounced certainly was not a judgment derived from a completed trial but pursuant to a summary proceeding which came via a motion. It affected the rights and person of the accused, with that order being enforceable and final in that he was now prevented from pleading that bar, or of adducing any evidence to prove his previous conviction based on the same facts. B C

The consequential effect of the dismissal of the prayer in the 'notis usul' was that, being dissatisfied with the order, the accused filed the notice of appeal which was administratively accepted by the High Court staff. Having done that, he waited for the written judgment for purposes of his petition of appeal, pursuant to s 307(6) of the CPC, which required him to state the substance of the judgment appealed against. As I had concluded that the issue at hand was not procedural but substantive in nature and hence appealable, the magistrate therefore statutorily could not be excused from preparing the grounds of decision. Section 307(3) of the CPC reads: D E

When a notice of appeal has been lodged the court appealed from *shall make a signed copy of the grounds of decision* in the case and cause the same to be served upon the appellant or his advocate by leaving the said copy at the address mentioned in the notice of appeal or by posting it by registered post addressed to the appellant at the said address. (Emphasis added.) F

It was thus based on this statutory provision that I made the consequential order requiring the magistrate to prepare the unmistakable mandatory grounds of decision and at the same time directing that the trial be halted pending the outcome of the appeal.

In answer to the three questions recorded much earlier, the answers will be in the affirmative for the first two questions whilst for the third, the plea ought to be ventilated at the earliest of stages. For clarification, I have not delved into the merits of the appeal proper as the parties have not given any indication as to the course I ought to undertake, nor did I desire to do so in the circumstances of the case. G H

Order accordingly.

Reported by Hanim Kamaruddin